

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE
WRIT PETITION No.6558 OF 2005

Jingonda Vangonda Patil

since deceased by his heirs Petitioners

Versus

Pandit Bharmappa Niwte-Shastri

Registered Public Trust & Ors. Respondents

Mr.A.B.Borkar for petitioners

Mr.V.B.Rajure, for respndent nos.1 to 5

CORAM : P.V.KAKADE, J.

DATE : 23RD JANUARY 2006.

P.C.:

1. Heard the learned counsel for both the parties.
Perused the record.

2. The petitioners have challenged the order dated
12.8.2005 passed by Addl. District Judge, Kolhapur

rejecting their application Exh.63 in Reg. Civil Appeal No.138 of 1995.

3. Originally the suit was filed by the plaintiff-Trust for possession from defendant alleging that the plaintiff was a tenant in the suit premises, possession was claimed on different grounds such as defaulter, non-user, subletting, bonafide requirements etc. The suit came to be decreed with direction that the defendants shall hand over the vacant possession of the suit premises to the plaintiff. Against the said judgment and decree the original defendant filed Civil Appeal No.138 of 1995.

4. It appears from the record that while appeal was pending in the lower appellate court the defendant -appellant filed application Exh.63 requesting that the original defendant should be allowed to be examined as a witness in addition to the evidence led on behalf of defendant of his power of attorney. However, in view of the ruling of the Apex Court in the case of **Janki Vashdeo Bhojwani and Anr. vs. Indusind Bank Ltd. and Ors.** reported in **(2005) 2 SCC 217**, it was laid down that the evidence of power of attorney holder cannot be accepted

and he cannot depose about the facts which are exclusively in the knowledge of the principal and hence the position has occurred that the entire evidence on behalf of the defendant is nullified by virtue of the ratio laid down by the Apex Court in Bhojwani's case (supra). The application was challenged on behalf of the present respondents in the lower appellate court on various grounds with submission that the application was filed only as delaying tactics and was made only with malafide intention.

4. The learned counsel for the petitioner submitted that by rejection of this application the petitioner-defendant is prejudiced in the sense that he did not examine the defendant but executed a power of attorney in favour of his brother as per the legal advice given to him at that time and therefore, it is necessary that the original defendant should be allowed to be examined himself again. In this regard it must be noted that there is nothing on record to show that the defendant was not available at the time of recording of evidence of his power of attorney holder nor there is any circumstance to show that it was physically not possible for him to enter into witness box. In view of this position, it

cannot be said that the lower appellate court has erred in rejecting the application especially when it is seen that whatever right is obtained by the respondent by virtue of the Apex Court ruling would be prejudiced which cannot be allowed in law.

5. Perusal of the reasoning adopted by the lower appellate court appears to be legal, correct and therefore, it would brook no interference. In the result the petition stands dismissed with no order as to costs